LIBRARY
SUPREME COURT, U. S.

APR 24 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1366

ANGELO MARINO, THOMAS BASALARI and
ADAM NICHOLAS,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

JOSEPH FORER
DAVID REIN

430 National Press Building
Washington, D. C. 20004

Attorneys for Petitioners

Washington D C THIEL PRESS 202 393 0625

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
The Raising of the Federal Questions	5
REASONS FOR ALLOWING THE WRIT	6
1. The Self-Incrimination Question	6
2. The Vagueness Question	8
CONCLUSION	9
APPENDICES:	
Appendix A – The Judgments Below	1a
Appendix B – Order of Court of Appeals Denying Leave to Appeal	1b

TABLE OF AUTHORITIES

Cases:

Albertson v. SACB, 382 U.S. 70 (1965)	7
California v. Byers, 402 U.S. 424 (1971)	6, 7
Cole v. Arkansas, 333 U.S. 196 (1948)	8, 9
DeJonge v. Oregon, 299 U.S. 353 (1937)	9
Grosso v. United States, 390 U.S. 62 (1968)	7
Haynes v. United States, 390 U.S. 85 (1968)	7
Marchetti v. United States, 390 U.S. 39 (1968)	7
Russell v. United States, 369 U.S. 749 (1962)	8
United States v. Cruikshank, 2 Otto (92 U.S.) 542 (1876)	8
United States v. Hess, 124 U.S. 483 (1888)	8
United States v. Sullivan, 274 U.S. 259 (1927)	7

Statutes:

28 U.S.C. § 1257(3) 2

N. Y. Penal Law § 195.00, 39 McKinney's N. Y. Cons. Laws Ann. 1, 3

N. Y. Criminal Procedure Law §§ 460.10.5(a), 460.20, 11A McKinney's N.Y. Cons. Laws Ann. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

ANGELO MARINO, THOMAS BASALARI and
ADAM NICHOLAS,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Angelo Marino, Thomas Basalari and Adam Nicholas petition for a writ of certiorari to review judgments of the Appellate Division of the Supreme Court of New York, First Judicial Department, which affirmed judgments of the Supreme Court of New York, County of Bronx, convicting them of the crime of official misconduct, New York Penal Law § 195.00, 39 McKinney's N. Y. Cons. Laws Ann.

OPINION BELOW

The Appellate Division of the Supreme Court affirmed the convictions by order without opinion.

JURISDICTION

The judgments sought to be reviewed (Appendix A hereto) were dated and entered December 2, 1971.

Under §§ 460.10.5(a) and 460.20 of the New York Criminal Procedure Law, 11A McKinney's N. Y. Cons. Laws Ann., the judgments of the Appellate Division were reviewable by the Court of Appeals of New York on discretionary grant of an application for leave to appeal filed within 30 days. Such an application on behalf of the petitioners herein was filed with the Court of Appeals of New York on December 28, 1971. The application was denied on January 26, 1972 (Appendix B hereto).

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners' privilege against self-incrimination was violated by admitting as evidence of guilt their failure to comply with police department regulations requiring police officers to disclose information received by them concerning criminal activities and to record their official activities.

2. Whether petitioners were convicted in violation of procedural due process and the Sixth Amendment because of the vague and uninformative nature of the accusation against them.

STATEMENT OF THE CASE

After trial by jury, petitioners were convicted in the Supreme Court of New York, Bronx County, on the seventh count of a seven-count indictment. That count, laid under § 195.00 of the Penal Law of New York,[1] read as follows:

> "SEVENTH COUNT:
>
> "AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the Crime of OFFICIAL MISCONDUCT, A MISDEMEANOR, committed as follows:
>
> "The said defendants, acting in concert with each other, and another person, in the County of Bronx, on or about and between the 14th day of November, 1969, and the 24th day of November, 1969, while employed as public servants, to wit, detectives in the Police Department of the City of New York, with intent to obtain a benefit therefrom, to wit, approximately $1,300.00 United States Currency, a quantity of narcotic drugs, a sawed off shot gun, and other personal property from Barbara Kimble and John Garland, unlawfully refrained from performing a duty which was imposed upon them by law and which was clearly inherent in the nature of their offices."

Four other counts of the indictment were dismissed at the close of the evidence. Of the three counts that went to the jury, petitioners were acquitted on two felony charges, alleging, respectively, larceny by extortion and grand larceny of the property described in the seventh count.

At the trial, the evidence for both sides showed that petitioners, detectives of the New York Police Department,

---

[1] "195.00 Official Misconduct. A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit: . . . 2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office. Official misconduct is a Class A misdemeanor."

were admitted into the apartment of Barbara Kimble and John Garland. According to petitioners, they had gone to the apartment after receiving a report from an informant that its occupants were selling narcotics and receiving stolen goods there.

Kimble and Garland testified that petitioners ransacked the apartment, found and confiscated $1300 in cash, a supply of narcotics, a shotgun and other personal property, and then departed without making an arrest. Petitioners testified that they searched the apartment with Kimble's consent, found no contraband or other incriminating evidence, took nothing and left.

The evidence also showed that petitioners had long records of exemplary service as police officers and enjoyed good reputations. Kimble and Garland, on the other hand, by their own admissions were heroin addicts, trafficked extensively in drugs, and were living together without benefit of clergy.

The guilty verdict on the seventh count necessarily indicates that the jury credited the testimony of Kimble and Garland over that of the petitioners. On the other hand, the acquittals on the two larceny counts necessarily indicates a contrary jury resolution of the conflicting testimony.

The case against petitioners was significantly buttressed by testimony of a police captain, Hanley, introduced by the State in its direct case. Hanley testified that Police Department regulations required police to file reports (UF 61 Crime Reports) of information received by them concerning alleged criminal activity. He also testified that departmental regulations required detectives to record their official activities in memorandum books. He testified that he had searched the records and inspected the petitioners' memorandum books and had found no report or indication relating to petitioners' visit to the Kimble-Garland apartment.

Each appellant was sentenced to imprisonment for one year. The Appellate Division affirmed the convictions. The Court of Appeals denied petitioners' application for leave to appeal.

The Raising of the Federal Questions

1. At the trial, petitioners objected to the admission of testimony of Captain Hanley regarding their noncompliance with the departmental disclosure regulations (Trial Tr. 874-876, 879, 881). In their brief in the Appellate Division of the Supreme Court of New York, petitioners' Point III read: "The Appellants' Right of Silence Under the Fifth and Fourteenth Amendments to the Federal Constitution Were Violated" (Brief, p. 50). The text under that heading complained (pp. 50-51) that Captain Hanley's testimony was admitted in violation of petitioners' privilege against self-incrimination. The point was necessarily decided against petitioners by the orders of the Appellate Division affirming their convictions without opinion (Appendix A hereto).

2. The following passages from appellants' brief in the Appellate Division show the raising of the federal question as to the vagueness of the Seventh Count of the indictment:

> "The seventh count of the indictment nowhere alleged just what duty or duties were involved and which the defendants failed to perform. In charging the jury as to the seventh count, the court nowhere explained to the jury just what duties were ignored by the defendants nor did the court in any way define such duties." (P. 39.)
>
> "By not explaining the intentment of the statute and its meaning, the Court in effect allowed the statute to be considered by the jury as a vague, abstract matter and actually allowed the jury to determine what the law is. This would therefore convert the statute from a definite enactment to a vague enactment; see Giaccio v. Pennsylvania, 382 U.S. 399. In other words, the charge to the jury in regard to

the law of this case left the jury free to decide the issue without any legally fixed standards." (P. 47.)

"That the indictment in regard to the seventh count violated the Sixth Amendment to the federal constitution that requires that an accused in a criminal case be informed of the nature and cause of the accusation. See also Russell v. U.S., 369 U.S. 749; U.S. v. Lamont, 18 FRD 27, 31, aff'd 236 F (2) 812." (P. 48.)

This point was necessarily decided against petitioners by the orders of the Appellate Division affirming their convictions without opinion (Appendix A hereto).

REASONS FOR ALLOWING THE WRIT

1. The Self Incrimination Question

The admission of the testimony of Captain Hanley raises an important question concerning the application of the privilege against self-incrimination.

Where statutes or regulations require individuals to disclose information to the government, substantial questions relating to the privilege against self-incrimination inevitably arise. As was recently stated in *California v. Byers*, 402 U.S. 424, 427 (1971):

> "Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination are likely to give rise to serious questions."

In *Byers* and other cases in this Court, the "incriminating potential" of disclosure requirements was raised by individuals who were prosecuted for failing to comply with the requirements. The question, in each instance, was whether the fact that the disclosure would have been self-

incriminating was a defense to the prosecution. In *Byers* and *United States v. Sullivan*, 274 U.S. 259 (1927), a disclosure requirement prevailed over the claim of self-incrimination on the ground that the requirement was addressed to the public at large and neutral in nature. In *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Haynes v. United States*, 390 U.S. 85 (1968), the claim of privilege prevailed on the ground that the disclosure requirement was addressed to a " 'highly selective group inherently suspect of criminal activities' and the privilege was applied only 'in an area permeated with criminal statutes' – not in 'an essentially noncriminal and regulatory area of inquiry.' " *California v. Byers*, *supra*, at 430, quoting from *Albertson v. SACB*, 382 U.S. 70, 79 (1965), and *Marchetti* at 47.

In the instant case, petitioners were convicted of a crime labelled "official misconduct." As we later see, however, it is impossible to tell whether the alleged misconduct consisted of the failure to make the disclosures required by the police regulations or of some other default. In either situation a substantial question is presented.

If we assume that the accusation was noncompliance with the regulations, we have a situation in between *Byers* and *Sullivan* on the one hand and *Marchetti* and *Albertson* on the other. Here the disclosure requirements were addressed not to the general public, as in *Byers*, but to a discrete class, police officers, as in *Marchetti*. It would be an overstatement to say that this class is "inherently suspect of criminal activities." On the other hand, the regulation operates in a criminal area of inquiry, and it is fair to say that it is, at least in part, a safeguard against corrupt activities by the police.

If we assume that the indictment alleges nonperformance of some duty other than reporting and recording (e.g., a failure to arrest Kimble and Garland), we have a novel situation. The privilege issue arises not, as in the preceding

cases, in a prosecution for failure to make required disclosures. Instead, the issue is whether such a failure may be admitted as evidence that an accused committed a crime which presumably would have been disclosed had he made the disclosures.

On principle, such an evidentiary use of failures to make disclosures is, we submit, a violation of the privilege.

2. The Vagueness Question

The Sixth Amendment and due process require that a criminal accusation contain not only "the general description of an offense," but also "such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487 (1888). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). See also *Russell v. United States*, 369 U.S. 749 (1962); *United States v. Cruikshank*, 2 Otto (92 U.S.) 542, 558 (1876).

The accusation in this case alleged that petitioners "with intent to obtain a benefit therefrom . . . unlawfully refrained from performing a duty which was imposed upon them by law and which was clearly inherent in the nature of their offices." The "benefit" was specifically described. But nothing in the indictment (or the court's instructions to the jury) identified the "duty" which petitioners allegedly refrained from performing. For all one can tell, in the circumstances of this case, the alleged breach of duty may have been the failure to report and record as required by the departmental regulations, or a failure to turn over to

the police property clerk the seized narcotics, or a failure to arrest Kimble and Garland.[2]

Accordingly, petitioners were denied their Sixth Amendment right, incorporated in the due process clause of the Fourteenth Amendment, "to be informed of the nature and cause of the accusation" against them. And since it is impossible to tell what view the uninstructed jury took as to the meaning of the accusation, petitioners were convicted, in contravention of due process, of a charge on which they were never tried and which was never made. See *Cole v. Arkansas, supra,* at 201; *DeJonge v. Oregon,* 299 U.S. 353, 362 (1937).

CONCLUSION

Certiorari should be granted and the judgments below reversed.

Respectfully submitted,

JOSEPH FORER
DAVID REIN

430 National Press Building
Washington, D. C. 20004

Attorneys for Petitioners

---

[2] Of these three possibilities, the first (failure to report and record) was suggested by the trial court for the first time at a post-trial hearing on a motion to arrest judgment. (5-9, Tr. of Feb. 5, 1971.) On the other hand, the State's brief in the appeal stated (p. 31): "It is self-evident that the breach of duty herein was the failure to arrest."

APPENDIX A

The Judgments Below

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 2, 1971.

Present--Hon. Harold A. Stevens, Presiding Justice
Louis J. Capozzoli
Emilio Munez
Theodore R. Kupferman
Francis T. Murphy, Jr., Justices

The People of the State of New York, *Respondent,*

-against-

Angelo Marino, *Defendant-Appellant.*

No. 4448

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Sandifer, J.), rendered on February 5, 1971, convicting defendant of the crime of official misconduct (Penal Law § 195.00), and said appeal having been argued by Mr. Arnold E. Wallach of counsel for the appellant, and by Mr. Ronald D. Degon of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment ment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: HYMAN W. GAMSO,
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 2, 1971.

Present—Hon. Harold A. Stevens, Presiding Justice
Louis J. Capozzoli
Emilio Munez
Theodore R. Kupferman
Francis T. Murphy, Jr., Justice

The People of the State of New York, *Respondent,*	)	
— against —	)	**No. 4449**
Thomas Basalari, *Defendant-Appellant.*	)	

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Sandifer, J.), rendered on February 5, 1971, convicting defendant of the crime of official misconduct (Penal Law § 195.00), and said appeal having been argued by Mr. Arnold E. Wallach of counsel for the appellant, and by Mr. Ronald D. Degon of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: HYMAN W. GAMSO,
Clerk

a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 2, 1971.

Present—Hon. Harold A. Stevens, Presiding Justice
Louis J. Capozzoli
Emilio Munez
Theodore R. Kupferman
Francis T. Murphy, Jr., Justices

The People of the State of New York,
Respondent,

—against—

Adam Nicholas,
Defendant-Appellant.

No. 4450

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Sandifer, J.), rendered on February 5, 1971, convicting defendant of the crime of official misconduct (Penal Law § 195.00), and said appeal having been argued by Mr. Arnold E. Wallach of counsel for the appellant, and by Mr. Ronald D. Degon of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: HYMAN W. GAMSO
Clerk.

APPENDIX B

Order of Court of Appeals Denying Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. CHARLES D. BREITEL, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ANGELO MARINO, THOMAS BASALARI, and ADAM NICHOLAS,

Defendants-Appellants.

CERTIFICATE DENYING LEAVE

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated New York, New York
January 26, 1972

/s/ CHARLES D. BREITEL
Charles D. Breitel
Associate Judge

*Arnold E. Wallach, Esq.
299 Broadway
New York, New York 10007

Hon. Burton B. Roberts
District Attorney, Bronx Co.
851 Grand Concourse
Bronx, New York

Hon. Raymond J. Cannon, Clerk
Court of Appeals

*Briefs returned at office

*Description of Order:

2-5-71 Sup. Ct., Bronx Co., affirmed App. Div. 1st 12-3-71

LIBRARY
SUPREME COURT, U. S.

FILED
JUN 2 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1366

ANGELO MARINO, THOMAS BASALARI
and ADAM NICHOLAS,
Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BURTON B. ROBERTS
District Attorney
Bronx County
Attorney for Respondent
851 Grand Concourse
Bronx, New York 10451
(212) 588-9500

DANIEL J. SULLIVAN
Executive Assistant District Attorney

RONALD D. DEGEN
Assistant District Attorney
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument	
Point One—No federal questions were preserved for this Court's review	7
Point Two—No constitutional issue has been presented	9
A. Concerning elicitation of testimony regarding noncompliance with Police Department rules	9
B. Concerning the form of the indictment	13
Conclusion	15

TABLE OF AUTHORITIES

PAGE

Cases:

Albertson v. SACB, 382 U.S. 70 (1965) 12

California v. Byers, 402 U.S. 424 (1971) 11, 12
Clayton v. New Orleans Police Department, 236 So. 2d 548 (Ct. App.), *cert. den.* 256 La. 867, 239 So. 2d 363 (1970) 10

Grosso v. United States, 390 U.S. 62 (1968) 12

Haynes v. United States, 390 U.S. 85 (1968) 12

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 11

Leary v. United States, 395 U.S. 6 (1969) 12

McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) 12
Marchetti v. United States, 390 U.S. 39 (1968) 12
Matter of Krolick v. Lowery, 32 App. Div. 2d 317 (1st Dept. 1969), *aff'd* 26 N.Y.2d 723, *cert. den.* 397 U.S. 1075 (1970) 10

People v. Davies, 26 App. Div. 2d 573 (N.Y. 2d Dept. 1966) 13
People v. Glennon, 175 N.Y. 45 (1903) 13
People v. Heckt, 62 Misc. 2d 287 (N.Y. Erie Cty. Ct. 1969) 13
People v. Murphy, 135 N.Y. 450 (1892) 8
People v. Thompson, 58 Misc. 2d 511 (N.Y. Saratoga Cty. Ct. 1969) 13
People v. Vidal, 26 N.Y.2d 249 (1970) 8
Pickering v. Board of Education, 391 U.S. 563 (1968) 11

PAGE

Shapiro v. United States, 335 U.S. 1 (1948) 11
State v. Knowles, 79 Wash. 2d 835, 490 P.2d 113 (1971) 10

Toussie v. United States, 397 U.S. 112 (1970), *rev'g* 410 F.2d 1156 (2d Cir. 1969) 10

United States v. Minor, 398 F.2d 511 (2d Cir. 1968), *aff'd* 396 U.S. 87 (1969) 10
United States v. Reiff, 435 F.2d 257 (7th Cir. 1970), *cert. den.* 401 U.S. 938 (1970) 10
United States v. Silverman, 449 F.2d 1341 (2d Cir. 1971), *cert. den.* —— U.S. ——, 40 U.S.L.W. 3399 (Feb. 22, 1972) 10
United States v. Sullivan, 274 U.S. 259 (1927) 12

Wiemann v. Updegraff, 344 U.S. 183 (1952) 11

Constitution of the United States:

Fifth Amendment 9, 12
Sixth Amendment 2
Fourteenth Amendment 2, 9

Statutes:

28 U.S.C. §1257(3) 2
New York Crim. Proc. Law, §470.05(2) 8
New York Code Crim. Proc.:
§275 14
§285 14
§420-a 8

New York Penal Law, §195.00 ..... 1, 3, 13

Miscellaneous:

Stern & Gressman, *Supreme Court Practice*, Sec. 3.29, pp. 128-131 (4th ed. 1969) 7
Prince, *Richardson on Evidence*, §543 (9th ed., 1964) 8

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1366

ANGELO MARINO, THOMAS BASALARI and ADAM NICHOLAS,
Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioners in the above-entitled case pray for a writ of certiorari to review orders of the Supreme Court of the State of New York, Appellate Division, First Department, entered December 2, 1971, unanimously affirming judgments of the Supreme Court, Bronx County, rendered February 5, 1971, convicting them, after trial by jury, of the crime of Official Misconduct [New York Penal Law, §195.00], and sentencing them to definite terms of one year. They are presently at liberty on bail pending determination of this application.

Opinion Below

The Appellate Division of the Supreme Court affirmed the convictions without opinion [38 App. Div. 2d 688, 689].

Jurisdiction

The orders of the Appellate Division were entered on December 2, 1971. An application for leave to appeal to the Court of Appeals of the State of New York was denied by Judge Charles D. Breitel on January 26, 1972. This Court's jurisdiction is evoked under 28 U.S.C. §1257(3).

Questions Presented

In our view no substantial federal questions have been presented in this case. Nevertheless, we shall list the claims petitioners have set forth:

1. Whether proof at trial that petitioners, police officers at the time of indictment, had failed to file police reports and make entries in their memorandum books violated their privilege against self-incrimination under the Fifth and Fourteenth Amendments.

2. Whether the count of the indictment under which petitioners were convicted was so vague as to deprive them of due process under the Sixth and Fourteenth Amendments.

Statement of the Case

Although it is contended that the questions raised now were passed upon by the Appellate Division, which affirmed without opinion, petitioners have failed to seek amendment of the remittitur to reflect that the state courts passed upon constitutional issues.

The seven-count indictment herein charged petitioners, detectives of the New York City Police Department, with taking certain property from Barbara Kimble and John Garland, and it rested upon three theories: (1) larceny—that Kimble and Garland were the victims of extortion or theft (counts one and five); (2) bribery—that Kimble and Garland had a "meeting of the minds" with and consequently bribed the petitioners (counts three, four and six); and (3) official misconduct—that petitioners took property without either victimization or agreement (count seven). In addition, the petitioners were accused of burglary (count two).

Petitioners' convictions were under count seven of the indictment which accused them of the crime of Official Misconduct* committed as follows:

> "The said defendants, acting in concert with each other, and another person, in the County of Bronx, on

* Section 195.00 of the New York Penal Law provides in part: "A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or to deprive another person of a benefit:

* * *

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office."

or about and between the 14th day of November, 1969, and the 24th day of November, 1969, while employed as public servants, to wit, detectives in the Police Department of the City of New York, with intent to obtain a benefit therefrom, to wit, approximately $1,300.00 United States Currency, a quantity of narcotic drugs, a sawed off shot gun, and other personal property from Barbara Kimble and John Garland, unlawfully refrained from performing a duty which was imposed upon them by law and which was clearly inherent in the nature of their offices."

Following the presentation of evidence by both sides, the People conceded the absence of an agreement, the Court dismissed the burglary count, and the jury rejected the larceny allegations. Thus, the petitioners convictions rest entirely upon the third theory of law expressed in the indictment, to wit, official misconduct.

At trial it was undisputed that the petitioners were present in the Kimble-Garland apartment on November 17 or 18, 1969, in their official capacity as detectives. Testimony from both sides showed that they had conducted a search of the premises at 1483 Hoe Avenue with Barbara Kimble, John Garland and various other people present. In addition, it was agreed by all concerned that Detective Michael Ryan joined the petitioners in apartment 11. Finally, it was uncontested that no arrests were made and that no subsequent police action was taken by the detectives as a result of their visit to that address. The People's witnesses testified that the petitioners found and confiscated narcotics, a sawed-off shotgun, money and stolen property, including jewels.

One of the People's witnesses—Captain Hanley—testified that he searched the records of the New York City Police Department for a report on the Hoe Avenue incident, but found no indication that a report had been filed thereon by anyone. Counsel interposed only a general exception which was overruled (874-876).* When Hanley further testified that Police Department Rules require the filing of such reports (877) and that he found nothing filed by petitioners (880), no defense objection was placed on the record. Moreover, petitioners only objected that Hanley was "referring to contents of something that's not in evidence" when he testified that police officers are required to keep memorandum books, which in the case of petitioners, contained no mention of their visit to apartment 11 at 1483 Hoe Avenue (880-881). Finally, that no D.D. 62 forms could be found was admitted without protest (882).**

---

* References are to the Stenographic Minutes of Trial.

** What rules are involved and what they entail are not included in the record. Apparently, petitioners are referring to the Rules and Procedures of the New York City Police Department. The texts of various regulations read in relevant part as follows:

> *Rule 21/1.0*—"Charges in writing may be preferred against a member of the department alleged to have violated these Rules and Procedures."
>
> *Rule 3/26.0*—"The department furnishes U.F. 16 (Memorandum Pad) * * * for making reports and other notes. Members of the force shall preserve their completed memorandum pads and produce them as required by competent authority."
>
> *Rule 7/4.0*—"Detectives shall maintain on U.F. 16 (Memorandum Pad) a daily chronological record of duty performed by them."

Three police forms appear in the testimony at trial. The U.F. 61 is a complaint report which is prepared whenever criminal activity is reported or observed. The D.D. 5 is a supplementary complaint report containing information as to any action taken or news received after completion of the U.F. 61. The D.D. 62 is a chronological listing of cases kept in each detective squad office and containing, in order of receipt, each complaint, investigation or arrest made by a member of the Detective Division.

All three petitioners testified that petitioner Basalari received a tip from an informant regarding the sale of narcotics and the presence of stolen property, and that pursuant thereto they proceeded to 1483 Hoe Avenue. On cross-examination petitioner Nicholas was asked whether any Police Department records or reports relative to his actions in the Kimble apartment existed, and he answered, "No, to the best of my knowledge, no" (1101). No exception to the question was entered. Later, the People offered his memo book into evidence and defense counsel objected, noting that "there's no entry in there about November 17th. It's a violation of a constitutional right." At that point, however, the offer was withdrawn and only those pages concerning November 17th were introduced into evidence. No further objection was voiced (1112-1113). Subsequently, Basalari, too, was interrogated about his filing of reports, making of memo book entries and accounting to superior officers, whereupon objections were made but no grounds were given therefor (1326-1327). Petitioner Marino answered that no U.F. 61 or D.D. 5 forms regarding his activities were on file without an objection being taken (1408-1409).

Petitioners did not demur to the indictment [former New York Code Crim. Proc., §323]. In their 57-page brief to the Appellate Division, their complaint was addressed to the sufficiency of the proof at trial, rather than the adequacy of the indictment. The only mentioning of a possible shortcoming in the indictment was the following incomplete sentence:

> "That the indictment in regard to the seventh count violated the Sixth Amendment to the federal constitu-

tion that requires that an accused in a criminal case be informed of the nature and cause of the accusation. See also Russell v. U.S. 749; U.S. v. Lamont 18 FRD 27, 31, aff'd 236 F (2) 812'' (p. 48).

Although the Appellate Division affirmed the convictions without opinion, petitioners have not sought to amend the remittitur.

ARGUMENT

POINT ONE

No federal questions were preserved for this Court's review.

Reflective of petitioners' awareness that the issues raised herein were not saved for this Court's consideration is their insistence upon coming into this Court on a clouded record. The decision not to amend the remittitur makes the basis for the state court affirmance without opinion unclear and necessitates the dismissal of the instant petition [see Stern and Gressman, *Supreme Court Practice,* Sec. 3.29, pp. 128-131 (4th ed. 1969)].

Furthermore, we submit that both points contested by petitioners were decided on independent state grounds. In each instance the Appellate Division could have resolved the problem procedurally without reaching the merits thereof.

With respect to the self-incrimination plaint, we have summarized the proceedings surrounding the introduction of the controversial evidence in our Statement of the Case,

supra. A general objection without specific mention of any alleged infirmity is insufficient to save an exception on appeal in New York, unless the evidence was not admissible for any purpose and no corrective action could have cured the inadmissibility [*People* v. *Vidal,* 26 N.Y.2d 249 (1970); *People* v. *Murphy,* 135 N.Y. 450 (1892); Prince, *Richardson on Evidence,* §543 (9th ed., 1964)] or a request to charge was made that the failure to file reports is not to be considered by the jury [New York Crim. Proc. Law, §470.05(2); former New York Code Crim. Proc., §420-a].

In addition, the Appellate Division may have found Captain Hanley's testimony innocuous. The petitioners admitted on the witness stand that no memorandum book entries were made and no reports were filed, and, of course, their credibility could be thus tested by inquiry in that regard. No claim has been advanced that they were forced to testify.

Likewise, the Appellate Division could have found that petitioners' failure to demur to the indictment precluded its determination of the vagueness of the indictment issue [former New York Code Crim. Proc., §331], that is, if they could even detect that point, which we neither discerned nor argued in our brief to that Court. As we indicated above, in our view petitioners never raised it until they filed the instant petition seeking certiorari.

In conclusion, it appears that the New York courts have not passed on either question upon which review is sought.

POINT TWO

No constitutional issue has been presented.

As previously stated, in our view, petitioners' claims must be disposed of without reaching a determination on the merits. Nevertheless, we shall treat their arguments in sequence.

A. Concerning elicitation of testimony regarding noncompliance with Police Department rules

Petitioners claim that the introduction of testimony regarding their failure to keep records and file reports infringed upon their privilege against self-incrimination.

In our view the Fifth and Fourteenth Amendments do not apply to the case at bar. The policeman is only required to report a lawful activity. Had petitioners complied with the rule, they would never have been harmed by it. At trial they admitted being present in the Kimble apartment. Thus, we cannot see how their constitutional rights were violated by a regulation that they put down in their memorandum book what they would swear to later before a jury.

No exertion of any force upon a police officer to incriminate himself exists. In fact, the rules do not envision that anyone will incriminate himself and nothing inherently inculpatory can be found therein. The policeman does not have to admit an action which may hurt him. Here, petitioners' decision not to perform an affirmative act appears as an equivocal piece of evidence which may

constitute consciousness of guilt. But, that happenstance does not invalidate the regulation. In other situations, the courts have not automatically termed a disclosure requirement potentially violative of constitutional rights and applied a balancing test, as petitioners would have us employ [*Toussie* v. *United States,* 397 U.S. 112, 133 (1970) (dissenting opinion), *rev'g on other grounds,* 410 F.2d 1156, 1160 (2d Cir. 1969) (men must register for draft late in spite of danger of prosecution for not registering on time); *United States* v. *Silverman,* 449 F.2d 1341, 1345-1346 (2d Cir. 1971), *cert. den.* —— U.S. ——, 40 U.S.L.W. 3399 (Feb. 22, 1972) (attorney required to file closing statements in contingent fee cases used by I.R.S. to convict for attempted income tax evasion); *United States* v. *Reiff,* 435 F.2d 257 (7th Cir. 1970), *cert. den.* 401 U.S. 938 (1971) (physician must keep records as to disposition of certain drugs); *United States* v. *Minor,* 398 F.2d 511, 513-514 (2d Cir. 1968), *aff'd* 396 U.S. 87 (1969) (distributor of narcotic drugs cannot sell without written order form supplied by buyer to whom privilege is personal); *Clayton* v. *New Orleans Police Department,* 236 So. 2d 548, 551 (Ct. App.), *cert. den.* 256 La. 867, 239 So. 2d 363 (1970) (police officers who were possible suspects in homicide required to take polygraph tests); *Matter of Krolick* v. *Lowery,* 32 App. Div. 2d 317, 319 (1st Dept. 1969), *aff'd* 26 N.Y.2d 723, *cert. den.* 397 U.S. 1075 (1970) (firemen required to take alcohol content blood test); *State* v. *Knowles,* 79 Wash. 2d 835, 490 P.2d 113, 117-118 (1971) (welfare recipient required to file truthful reports in order to obtain benefits)].

Certainly, the privilege against self-incrimination does not apply to our set of facts, too, for the nature of the

act is not the relevant criterion. It is merely fortuitous that an act of "silence" is involved. The reporting requirement is indistinguishable from other job requisites, such as signing in and out of the precinct, giving a ticket for a traffic infraction, and wearing a uniform while on duty.

In any event, considering the public nature of the reports and memorandum pads and the underlying purpose of the rules calling for them, that is, to maintain the efficient running of a large bureaucratic organization by making possible both intelligent internal communications and the refreshing of the officer's recollection at a later date, such as at a trial, the privilege asserted does not apply to the situation at hand under the "required records" doctrine [*Shapiro* v. *United States,* 335 U.S. 1 (1948)]. In fact, petitioners apparently do not seek to strike down any of these requirements—no doubt recognizing their propriety—but, instead, merely seek to impose a use restriction. We submit that this concession on their part resolves any possible constitutional problem, since petitioners offer neither reason nor authority for such a proposition. *Arguendo,* were the "balancing test" applicable here, no question would arise that the rules must be sustained.

The application of a "balancing test" to the public need concerned and the potential threats to the constitutional protection claimed [*cf. California* v. *Byers,* 402 U.S. 424 (1971); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Wiemann* v. *Updegraff,* 344 U.S. 183 (1952)] shows that no federal question exists.

Here, the need is so great that it has not even been disputed, as we noted above.

The situation closely parallels the circumstances in *California* v. *Byers, supra*—a case holding a disclosure requirement did not infringe upon the self-incrimination privilege —and has none of the fatal characteristics present in *Marchetti* v. *United States* [390 U.S. 39 (1968)], *Grosso* v. *United States* [390 U.S. 62 (1968)] and *Haynes* v. *United States* [390 U.S. 85 (1968)]—decisions condemning reporting mandates as violative of the Fifth Amendment—in that the activity regulated is lawful [*United States* v. *Sullivan,* 274 U.S. 259 (1927)], the rules' purposes are noncriminal with self-reporting essential to their fulfillment [*Leary* v. *United States,* 395 U.S. 6 (1969)], they are not "directed at a highly selective group inherently suspect of criminal activities" [*Albertson* v. *SACB,* 382 U.S. 70, 79 (1965)], and they do not expose police officers to a " 'real and appreciable' " risk of self-incrimination [*Leary* v. *United States, supra* at 16].

In the instant case, we have a police department-police officer relationship with a condition, made prior to hiring, that the officer file reports of his daily on-the-job activities. "There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement" [*California* v. *Byers, supra* at 434] or to be policemen [*McAuliffe* v. *New Bedford,* 155 Mass. 216, 29 N.E. 517 (1892)]. We see no constitutional dilemma, especially where the prosecution is not for the failure to disclose (see Point Two B, *infra*) and no particular group of officers is singled out. "The mere possibility of incrimination is insufficient to defeat

the strong policies in favor of a disclosure called for by statutes like the one challenged here" [*California* v. *Byers, supra* at 428].

Finally, by taking the witness stand, all the petitioners waived their privilege against self-incrimination and offset any possibility of resulting prejudice from the testimony of Captain Hanley. When testifying, they cannot select the testimony which they want the jury to hear.

B. Concerning the form of the indictment

Petitioners contend—for the first time in the history of this case—that the seventh count of the indictment—as distinguished from the formulation of Penal Law, §195.00—was impermissibly vague for its failure to specify the duty omitted. We know of no rule or reason raising vague pleading to the status of a constitutional issue. The fault, if any, is poor draftsmanship of the relevant count. New York has a procedural remedy therefor, but petitioners chose not to exercise it by declining to demur. Since no claim has been advanced that the statute is unconstitutional, the availability of a state remedy leaves no issue for this Court to review.

As a practical matter the petitioners received due notice of the charge, that is, that the duty not performed was arrest. Incidentally, New York case law makes the failure to arrest a violation of the statute [*People* v. *Glennon,* 175 N.Y. 45 (1903); *People* v. *Davies,* 26 App. Div. 2d 573 (N.Y. 2d Dept. 1966); *People* v. *Heckt,* 62 Misc. 2d 287 (N.Y. Erie Cty. Ct. 1969); *People* v. *Thompson,* 58 Misc. 2d 511 (N.Y.

Saratoga Cty. Ct. 1969)]. On this record the claim that petitioners were misled as to the duty not performed must be rejected as specious, as we shall illustrate by briefly examining the indictment as a whole and reviewing the actions taken in the trial court.

Count three of the indictment, in charging petitioners with bribe receiving, alleged that they acted "upon an agreement and understanding that their opinion, judgment, action, decision, and exercise of discretion as public servants would thereby be influenced." What could three detectives improperly do to help two addicts found in possession of narcotics other than to decline to arrest them? Similarly, counts one, four and six lead to the conclusion that petitioners were remiss for their omission of arrest, so that the indictment, when read as a whole, sufficiently informed petitioners as to the nature of the charges against them.

While an indictment must include "[a] plain and concise statement of the act constituting the crime" [former New York Code Crim. Proc., §275], the instrument is not insufficient where no prejudice to a defendant has resulted from a defect [*id.*, §285]. The duty of a police officer to make an arrest when he sees a crime being committed is such an obvious one that all parties and the Court seem to have treated the refraining from arresting as the nonfeasance under consideration. That knowledge explains why no complaint was made until petitioners reached the appellate level. In fact, the indictment was not even under attack in the Appellate Division.

Moreover, it should be noted that the prosecutor in his summation noted that petitioners "are not on trial for any

violations of any rules and regulations of the Police Department" (1570), no evidence of any duty to turn over the narcotics seized was adduced, and no request to charge was offered at trial. Furthermore, even defense counsel stated on the record, at one point, "They're not on trial, your Honor, for any violations of rules or procedures within the Police Department" (82). Finally, in instructing the jury on the elements of extortion, the trial judge charged that the fear involved was that petitioners would be placed under arrest (1694, 1697).

It is difficult to comprehend how petitioners can seriously suggest that they were uninformed as to the nature of the charges against them. Thus, we appear to be confronted with an ingenious afterthought which might have given the trial court pause had petitioners entered a timely demurrer.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BURTON B. ROBERTS
District Attorney
Bronx County
Attorney for Respondent

DANIEL J. SULLIVAN
Executive Assistant District Attorney

RONALD D. DROBEN
Assistant District Attorney

Of Counsel

June, 1972